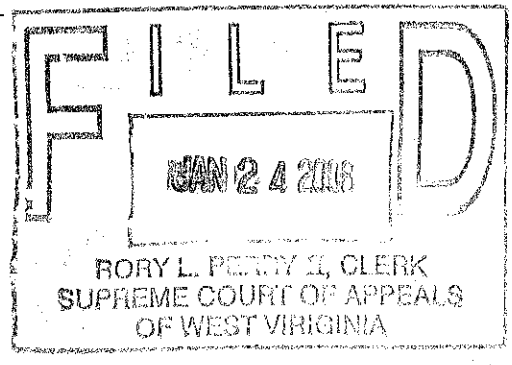
No. 33731

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



STEVEN T. LOWE,

Appellee-Petitioner below,

v.

JOSEPH CICCHIRILLO, Commissioner of the West Virginia Division of Motor Vehicles,

Appellant-Respondent below.

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

BRIEF OF APPELLEE

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TABLE OF CASES AND AUTHORITIES RELIED UPON

KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

This is an appeal by the Respondent, Commissioner of the Division of Motor Vehicles, from a ruling of the Circuit Court of Harrison County reversing the ruling of the Commissioner revoking Appellee's driving privileges for six (6) months for driving under the influence of alcohol.

STATEMENT OF THE FACTS

Petitioner, Steven T. Lowe, was involved in a motor vehicle accident on Old U.S. Route 50 near Salem, West Virginia on December 10, 2005. He was injured in the accident, which injuries among others, consisted of a broken ankle which required surgery. Mr. Lowe was in the emergency vehicle ready to be transported to United Hospital Center when the arresting officer arrived at the scene. The officer, Deputy Shaun Fleming, did not observe the petitioner driving nor did he speak with him that evening.

Deputy Greg Scolapio testified that he was at the scene before Deputy Fleming arrived and that he saw Mr. Lowe outside his vehicle and smelled an odor of alcoholic beverage on his person. Oddly, however, Deputy Scolapio was not listed as a witness on Deputy Fleming's DUI Information Report nor was he subpoenaed as a witness at the criminal trial in the Magistrate Court.

On January 24, 2006, approximately 6 weeks after the accident, Deputy Fleming went to Mr. Lowe's home where he was recuperating from his operation and obtained a signed statement from Mr. Lowe that he had been drinking beer that day, but when asked if he felt he was under the influence of alcohol at the time of the crash, he answered "no".

On January 27, 2006, Deputy Fleming obtained a search warrant from the Magistrate Court to obtain Mr. Lowe's blood test results conducted at United Hospital Center (UHC) in connection with his medical treatment.

A criminal trial for DUI was conducted in the Magistrate Court on May 24, 2006 and Mr. Lowe was found not guilty. At the administrative hearing before the DMV Hearing Examiner the transcript of Mr. Lowe's acquittal was introduced into evidence.

The United Hospital Center blood test results were also admitted into evidence by Deputy Fleming producing a single sheet of paper showing the test results which was not certified as the official medical records of UHC, nor was there a doctor or technician from the hospital present to testify as to the manner in which the blood specimen was taken or manner of testing.

Appellant fails to point out in his recital of the facts that the arresting officer concluded that Appellee was not at fault in the accident. Consequently, he did not observe any improper driving by Mr. Lowe and Appellant also failed to include Deputy Scolapio's testimony that Appellee had an injury to his leg and that he was in pain, both of which could have an impact on Mr. Lowe's appearance.

The assertion by Appellant that the Appellee was driving improperly is based upon an erroneous finding by the Commissioner.

On Page 9 of the Commissioner Ruling, he says that Mr. Lowe was driving improperly by passing a vehicle in his lane of traffic, resulting in a two-vehicle accident. Deputy Fleming testified (Page 16 of the transcript of evidence) as follows:

> "Q. You concluded after conducting an investigation of the accident that Mr. Lowe was not at fault?

Dep. Fleming: Yes, correct.

Q. You didn't, never saw him driving the vehicle?

Dep. Fleming: Correct."

The Commissioner further stated that there was no medical evidence submitted regarding Mr. Lowe's broken ankle as a reason for his being unsteady on his feet. Therefore, it is unclear if the broken ankle affected Deputy Scolapio's opinion that Mr. Lowe was wobbly on his feet.

On Page 8 of the transcript of the evidence, Deputy Scolapio said that Mr. Lowe was leaning up beside the vehicle and "I believe he had an injury to his leg or ankle and on Page 9 of the transcript, Deputy Scolapio to counsel's question if Mr. Lowe had an injury to his leg and he answered "Yeah, well, he did, yeah" and further

"Mr. Jones: and pain"

Dep. Scolapio: yeah from the impact"

On the scheduled day for oral argument in the Circuit Court appeal, counsel for the Appellant, who had not filed any written response to the appeal petition, stated to the Judge off the record, that she had no defense to errors alleged.

POINTS AND AUTHORITY RELIED UPON, A DISCUSSION OF THE LAW AND THE RELIEF PRAYED FOR

THE BLOOD TEST RESULTS

Appellee does not contend that the blood test administered at United Hospital Center is not admissible per se, but the Commissioner relied upon State ex rel. Allen v. Bedell, 193 W. Va. 32, 454 S.E.2d 77 (1994) for the admissibility of the blood test. Counsel for Appellee herein was counsel for Mr. Allen in that case. All Allen says is that blood tests taken in the course of medical treatment even though not

ordered by the police officer are admissible and that W. Va. Code § 57-5-4d is not an absolutely necessary procedure for admitting the records. Certainly, the hospital records can be obtained by subpoena. All § 57-5-4d does is provide a method to have hospital records admitted without requiring the medical records clerk in Court to verify their authenticity. Allen certainly does not allow a police officer to show up with one sheet of paper purportedly obtained through a search warrant and have it admitted as a fact, that the test was properly administered. In this case there was no certificate that the records submitted by Deputy Fleming were the actual records and the submitted record was not obtained by subpoena duces tecum. There was no person authorized by statute to draw blood there to testify nor was there any chemist or technician there to testify as to how the blood was tested and the results thereof.

Another argument Appellant presumably is making is that the blood tests are admissible as a business record under Rule 803(6) W. Va. Rules of Evidence.

Before evidence may be admitted under W. Va. R. Evid. 803(6), the proponent must demonstrate that such evidence is (1) a memorandum, report, record, or data compilation, in any form; (2) concerning acts, events, conditions, opinions or diagnosis; (3) made at or near the time of the matters set forth; (4) by, or from information transmitted by, a person with knowledge of those matters; (5) that the record was kept in the course of a regularly conducted activity; and (6) that it was made by the regularly conducted activity as a regular practice.

Under the rule the proponent of a record must lay the foundation for its admissibility by establishing the above-cited criteria, through the custodian or other qualified witness who must also be able to withstand a cross-examination designed to

display that the source of the information or the method of its preparation lacked trustworthiness. In order properly to authenticate records under Rule 803(6), the witness must either be a proper custodian of the records or an otherwise qualified witness. In fact, a qualified witness under Rule 803(6) can be anyone who understands the recordkeeping system. Business records being admitted under Rule 803(6) are not self-authenticating and a trial does not commit error by requiring a party to introduce those records through a custodian.

See, Cleckley, Handbook on Evidence For West Virginia Lawyers, Fourth Edition §8-3(B)(6) pages 8-139 and 8-140.

The Appellant further asserts that the statement of arresting officer is alone sufficient to establish the blood test results and that no challenges were made by the Appellee. This is not correct. On pages 12 and 13, counsel for Appellee objected to the admission of the blood test results. This certainly amounts to a challenge of the medical record which Deputy Fleming was attempting to introduce.

The Commissioner wants to rely upon the recent case of Crouch v. West Virginia Division of Motor Vehicles, 219 W. Va. 70, 631 S.E.2d 628 (2006) for the proposition that if there is something in the file submitted by the police officer then any opinion stated therein, whether or not supported by any other evidence, will be taken as a fact. Crouch is not that expansive. It merely addresses the fact that the affidavit filed by the police officer can be used as evidence that the offense occurred in Raleigh County unless there is evidence to the contrary. Footnote 12 of the Crouch opinion says "we point out that the fact that a document is deemed admissible under the statute does not preclude the contents of the document from being challenged during

the hearing." In the instant case the accuracy of the document was challenged by the Appellee.

Incidentally, in this case the affidavit filed by Deputy Fleming did not state whether Mr. Lowe was believed to be under the influence of alcohol, drugs, or both alcohol and drugs. That in itself may be a fatal procedural defect. W. Va. Code § 17C-5A-1 states:

> "The report shall include the specific offense with which the person is charged."

W. Va. Code § 29A-5-2 provides that agencies shall be bound by the rules of evidence as applied in civil cases. Consequently, the Commissioner had the burden to prove by a preponderance of evidence that the petitioner drove a motor vehicle while under the influence of alcohol. The Commissioner erred in presuming that every document in the file constituted sufficient evidence to make the case unless the petitioner (Appellee herein) put on evidence to the contrary. This is a burden shifting ruling. Rule 301. West Virginia Rules of Evidence provides that even though a presumption may be imposed against a party which may need to be rebutted, a burden shift does not occur. The burden throughout the trial remains upon the party upon whom it was originally cast. Under the Commissioner's theory, a defendant in a civil case could never get a directed verdict after the plaintiff's case, even though plaintiff fails to produce sufficient evidence to go to a jury. In Ours v. West Virginia Department of Motor Vehicles, 173 W. Va. 376, 315 S.E.2d 634 (1984), the Court held in a license suspension case (for failure to have liability insurance) that the Commissioner could not rely solely upon written accident reports to make a case. The Commissioner did not put on any live witnesses at the hearing in that case.

W. Va. Code § 17C-5-6 prescribes the method by which blood tests are to be conducted when acting at the request of a police officer. Only a doctor of medicine or osteopathy, or registered nurse, or trained medical technician at the place of his employment, acting at the request and direction of the law-enforcement officer, may withdraw blood for the purpose of determining the alcoholic content thereof. These limitations shall not apply to the taking of a breath test or a urine specimen. In withdrawing blood for the purpose of determining the alcoholic content thereof, only a previously unused and sterile needle and sterile vessel may be utilized and the withdrawal shall otherwise be in strict accord with accepted medical practices. A nonalcoholic antiseptic shall be used for cleansing the skin prior to venapuncture. Surely, it cannot be circumvented simply because the police officer did not request it. § 17C-5-6 is for the purpose of insuring the accuracy of the blood test by dictating the method by which it shall be done. The same requirements apply if the person arrested requests a test.

In the Allen case the State was required by the trial Judge to follow the dictates of § 17C-5-6 in order to admit Allen's blood test results even though it was not taken at the request of the arresting officer.

FAILURE TO CONSIDER AND GIVE SUBSTANTIAL WEIGHT TO APPELLEE'S ACQUITTAL IN CRIMINAL CASE

The Commissioner's Order stated that he could not give any consideration to the acquittal of the petitioner at the criminal trial because petitioner did not put on any evidence as to why there was a directed verdict of acquittal at the criminal trial (see Page 7 and 8 of the Commissioner's ruling). The Commissioner cited Choma v. W. Va. Division of Motor Vehicles, 210 W. Va. 256, 557 S.E.2d 310

(2001) in support of his ruling. Choma says no such thing. What Choma does say is that the Commissioner of Motor Vehicles must consider and give substantial weight to the results of related criminal proceedings involving the same person who is the subject of the administrative proceeding before the Commissioner, when evidence of such result is presented in the administrative proceeding (emphasis mine). No where does Choma say that the criminal case has to be rehashed or retried at the administrative proceeding.

For the foregoing multiple errors of fact and law made by the Commissioner, the Order of the Circuit Court of Harrison County reversing the Commissioner should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of January, 2008, I served the foregoing Appellee's Brief upon Janet James, Assistant Attorney General for West Virginia, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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